No. 16244

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERIC O. SONNTAG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

The jurisdiction of the District Court is founded upon Title 18, U. S. C. A., Section 3231 (June 25, 1948), and initially arose in this case by reason of an indictment [Clk. Tr. 2], returned by the Grand Jury in the Southern District of California, Central Division, in which appellant was charged in eleven counts with devising and intending to devise a scheme and artifice to defraud, by use of the United States mails, divers persons who desired to purchase pets and other animals from him, all in violation of Title 18, U. S. C. A., Section 1341 (as amended May 24, 1949).

Hearing was had on a motion [Clk. Tr. 18, *et seq.*] by appellant under Rule 17(b) of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A., to have subpoenaed at the government's expense certain named wit-

nesses. Upon denial of said motion, appellant was tried in a bench trial which resulted in a judgment of conviction [Clk. Tr. 102] for which appellant was sentenced to the custody of the Attorney General for a period of 14 months.

The jurisdiction of this court was invoked by a notice of appeal [Clk. Tr. 113] under the provisions of Title 28, U. S. C. A., Section 1291 (October 31, 1951), and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (as amended April 12, 1954, effective July 1, 1954).

Throughout this brief, all references to pages in the Clerk's Transcript will be preceded by the abbreviation "Clk. Tr.," while all references to the pages in the Reporter's Transcript will be preceded by the abbreviation "Tr."

Statement of the Case.

This is an appeal from a judgment of conviction by which appellant was sentenced to a 14-month term of imprisonment for devising and intending to devise, over a 37-month period ranging from January, 1955, to February, 1958, a scheme and artifice to defraud divers persons by the operation of a mail order pet and rare animal business. Appellant seeks reversal of this judgment on the twofold ground that certain of the findings of fact of the Honorable Ernest A. Tolin, United States District Judge, while finding some support in the record, are clearly erroneous and that the Honorable Jacob Weinberger, United States District Judge, erred in denying appellant's motion to have witnesses produced at the government's expense under Rule 17(b), Federal Rules of Criminal Procedure, Title 18, U. S. C. A., on the ground that appellant's affidavit in support of said motion was insufficient.

The pertinent facts are as follows: Appellant is fifty-three years old, married, and the father of two daughters [Tr. 419]. In 1947, he came to this country from Germany via England, where he had lived for some years, and settled in Los Angeles [Tr. 419]. Soon after his arrival he borrowed $500.00 from his mother for initial working capital and opened a pet store [Tr. 419]. For about three years appellant operated a conventional retail pet shop [Tr. 364, 419, 420]. Then, in an attempt to enlarge the volume of his business, he began to advertise his animals for sale in various publications of nationwide circulation [Tr. 364]. In addition to magazine advertising, appellant also employed direct mail advertising whereby he would send directly to prospective customers cards or price lists which would list the animals he had available for sale at the time [Tr. 364]. Some of these cards of which Government's Exhibit 11 is an example contain wording to the effect that the listed animals were " 'IN STOCK FOR IMMEDIATE SHIPMENT' " [Tr. 17]. Also contained in many of appellant's mailings was a statement to the effect that " 'Deposits may be refunded on orders which cannot be filled within 45 days' " [Government's Ex. 2, Tr. 11]. At about the same time the tenor of appellant's business commenced to change from that of a small local retail pet shop to include worldwide importation and exportation of rare birds and animals on a wholesale basis [Tr. 420].

As a result of these activities, the volume of appellant's business increased; but the overhead increased apace and the business did not prosper [Tr. 420]. The business, hampered by lack of operating capital and by various interruptions in source of supply was continuously in a precarious financial condition [Tr. 420-421]. In an effort to keep down the overhead of the business, appellant

undertook to perform himself most of the work in the conduct of the business. In this he was assisted from time to time by some part-time girls and his wife [Tr. 423]. However, generally speaking, appellant not only bought and cared for the animals but kept the books and records, crated animals for shipment, arranged for advertising and mailing, answered correspondence, and generally performed the myriad jobs necessary to the conduct of a rather extensive import-export mail order business [Tr. 251, 434, 435]. Although he worked 7 days a week, 52 weeks a year, from the time he started the business [Tr. 423], appellant was still too overburdened to give that attention to detail which is requisite to good business practice [Tr. 433-434]. As a result, during the year 1955, and subsequent thereto appellant failed to fill certain mail orders received by him; nor did he in some cases refund the moneys which accompanied said orders although his advertising stated "deposits may be refunded on orders which cannot be filled within 45 days" [Government's Ex. 2, Tr. 11, 245].

Complaints about appellant's defalcations were made to the postal authorities during 1955 [Tr. 245-250]. Upon receiving these complaints, Postal Inspector Claude P. Donovan undertook an investigation of appellant and his business practices [Tr. 244-246]. In the course of his investigation, Inspector Donovan had conferences with appellant in August [Tr. 245, 253] and November [Tr. 255] of 1955 and February of 1956 [Tr. 261]. Additionally, the inspector talked with appellant over the telephone on several occasions [Tr. 257-258]. In these conversations Inspector Donovan informed appellant that the Post Office Department had received complaints against him for failure to fill orders or return money sent with the orders [Tr. 245-247]. Appellant admitted the truth of

the complaints [Tr. 248, 277] and explained to the inspector the problems inherent in the operation of his business [Tr. 250-252]. Appellant acknowledged his indebtedness to the complainants [Tr. 252] and told the inspector that he would do his best to refund the misappropriated funds. He expressed the view that business would improve so as to permit him to make full restitution to all parties whose orders had not been filled [Tr. 253, 256, 257, 259, 263, 264, 265, 266, 267].

In the course of his investigation, Inspector Donovan told appellant that in view of his (appellant's) promise to adjust the complaints the Post Office Department was "not in a position to do anything about it" (the complaints) [Tr. 260]. Appellant, in fact, on November 4, 1955, furnished the inspector with evidence of the adjustment of several of these complaints [Tr. 257]. Throughout his contacts with Inspector Donovan, appellant repeatedly explained that his failure to properly service his customers was the result of failure of his source of supply [Tr. 259] coupled with the financial inability to make all refunds [Tr. 256]. He at all times made clear that his intent was to repay his creditors as soon as he could [Tr. 253, 256, 257, 259, 263]. Following his last conversation with Inspector Donovan in February, 1956, appellant did, in fact, repay over a dozen of his mail order creditors [Tr. 73, 369, 370, 376, 377, 379]. All told, appellant has during the period covered by the indictment made refunds to more than twenty people in a total sum of over $1,000.00 [Tr. 73, 366, 367, 369, 370, 371, 375, 376, 377, 379].

On February 19, 1958, the Grand Jury for the Southern District of California, Central Division, returned a true bill indicting appellant on eleven counts for devising

and intending to devise a scheme and artifice to defraud by use of the mails divers persons, nine of whom were named in the indictment [Clk. Tr. 2-9]. Appellant made a motion under Rule 17(b), Federal Rules of Criminal Procedure, Title 18, U. S. C. A., to subpoena, at the government's expense, witnesses from various parts of the country [Clk. Tr. 18 *et seq.*].

Hearing on the motion was had at San Diego, California, before the Honorable Jacob Weinberger [Tr. A-1 to A-36]. After hearing argument, the Honorable District Judge denied appellant's motion on the ground that appellant's affidavit in support thereof was insufficient to meet the requirements of Rule 17(b), Title 18, U. S. C. A. [Clk. Tr. 43; Tr. A-32].

On June 17, 1958, the cause came on for trial before the Honorable Ernest A. Tolin, sitting without a jury, in Los Angeles, California. Since appellant's motion under Rule 17(b), Title 18, U. S. C. A., *supra,* had been denied, appellant was compelled to enter into a stipulation of testimony and facts [Clk. Tr. 55-85] to secure the testimony of the majority of his witnesses. At the trial, stipulations covering the testimony of 20 government witnesses was read into the record [Tr. 8-82], and at the conclusion of said reading the written stipulations on file were stricken and replaced by the stipulated testimony in the record [Tr. 82-83]. In addition to the aforesaid 20 stipulation witnesses, the government produced 9 witnesses in court and rested its case in chief. The defense introduced the stipulated testimony of 10 witnesses [Tr. 312-321] and produced 3 witnesses, including appellant, in court.

Following argument, the court found the appellant guilty. Special findings of fact were submitted by the

government. Objections to said special findings were entered by the appellant [Clk. Tr. 94], who also submitted proposed special findings [Clk. Tr. 96]. Objections were filed by the government to appellant's proposed findings [Clk. Tr. 100]. On July 11, 1958, the court overruled appellant's proposed findings and, despite appellant's objections, the following findings were finally adopted pursuant to Rule 23(c), Federal Rules of Criminal Procedure, Title 18, U. S. C. A., which findings, it is submitted by the appellant, are, in the light of the evidence, "clearly erroneous" in that the evidence upon which they are based is as consistent with the theory of innocence as it is with the adopted theory of guilt:

(a) Finding of fact II [Clk. Tr. 104-105] that prior to on or about January 26, 1955, and continuing to on or about February 19, 1958, appellant wilfully devised and executed a scheme and artifice, as charged in count one of the indictment [Clk. Tr. 2] and as reincorporated by reference in each of the subsequent counts of the indictment [Clk. Tr. 3-9];

(b) Finding of fact III [Clk. Tr. 105] that said scheme and artifice (the existence of which is denied by appellant based upon the evidence) was wilfully devised and executed by appellant to defraud divers classes of persons named in said finding and said indictment and to obtain money and property from said persons by means of false pretenses, representations, and promises which appellant knew at the time would be false when made;

(c) Paragraph 3 of finding of fact IV [Clk. Tr. 106] that at the time appellant caused various advertisements to be placed in certain magazines named in paragraph 1 of said finding of fact he (appellant)

did not intend to ship to the persons who ordered the same the pets, animals, birds, and reptiles which he so advertised and did not intend to refund deposits made on ordered pets, animals, birds, and reptiles not shipped within 45 days of appellant's receiving of said orders;

(d) Finding of fact V [Clk. Tr. 106] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count one of the indicement [Clk. Tr. 2-3] or anyone;

(e) Finding of fact VI [Clk. Tr. 106-107] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count two of the indictment [Clk. Tr. 3-4] or anyone;

(f) Finding of fact VII [Clk. Tr. 107] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count three of the indictment [Clk. Tr. 4] or anyone;

(g) Finding of fact VIII [Clk. Tr. 107] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count four of the indictment [Clk. Tr. 5] or anyone;

(h) Finding of fact IX [Clk. Tr. 108] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count five of the indictment [Clk. Tr. 5-6] or anyone;

(i) Finding of fact X [Clk. Tr. 108-109] in so far as it purports to find the existence of any scheme

or artifice on the part of appellant to defraud the persons named in count six of the indictment [Clk. Tr. 6] or anyone;

(j) Finding of fact XI [Clk. Tr. 109] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count seven of the indictment [Clk. Tr. 6-7] or anyone;

(k) Finding of fact XII [Clk. Tr. 109] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count eight of the indictment [Clk. Tr. 7] or anyone;

(l) Finding of fact XIII [Clk. Tr. 109-110] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count nine of the indictment [Clk. Tr. 8] or anyone;

(m) Finding of fact XIV [Clk. Tr. 110] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count ten of the indictment [Clk. Tr. 8-9] or anyone;

(n) Finding of fact XV [Clk. Tr. 110-111] in so far as it purports to find the existence of any scheme or artifice on the part of appellant to defraud the persons named in count eleven of the indictment [Clk. Tr. 9] or anyone;

(o) Finding of fact XVI [Clk. Tr. 111] in so far as it purports to find that the government established findings of fact II, III, IV (par. 3), V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV and

each count charged in the indictment beyond a reasonable doubt or in any way whatsoever;

(p) Finding of fact XVII, finding the appellant guilty as to counts one, two, three, four, five, six, seven, eight, nine, ten, and eleven of the indictment as charged therein.

Appellant's objection to the aforesaid findings is preserved for appeal by reason of Rule 52 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A. Rule 52(a) provides in pertinent part: "Requests for findings are not necessary for purposes of review." Under said rule, all objections to findings of fact are deemed reserved and are, accordingly, presented by the general appeal.

Judgment was entered in this case under which appellant was sentenced to a fourteen-month term of imprisonment [Clk. Tr. 102]. This appeal followed [Clk. Tr. 113].

Summary of Argument.

I.

INTRODUCTION.

II.

THE COURT ERRED IN DENYING ON THE GROUND OF INSUFFICIENCY OF THE SUPPORTING AFFIDAVIT APPELLANT'S MOTION UNDER RULE 17(b), TITLE 18, U. S. C. A., TO SUBPOENA WITNESSES AT GOVERNMENT EXPENSE.

III.

CERTAIN OF THE FINDINGS OF FACT ARE, IN LIGHT OF THE EVIDENCE, CLEARLY ERRONEOUS AND MUST BE REVERSED IN THAT THE EVIDENCE, CONSIDERED AS A WHOLE, IS AS CONSISTENT WITH INNOCENCE AS WITH GUILT.

ARGUMENT.

I.

Introduction.

This is an appeal by Eric O. Sonntag, appellant herein, from a conviction of violations of the mail fraud statutes, Title 18, U. S. C. A., Sections 1341 *et seq.* Appellant, in the operation of a mail order pet and rare animal business, placed advertisements in national magazines and mailed advertisements to divers persons in which he advertised various birds, animals, and reptiles to be "in stock for immediate shipment" and in which he further represented that deposits received by him might be refunded if he did not make shipment within 45 days.

While appellant has been engaged in the aforesaid business for over ten years, during the 37-month period from January, 1955, to February, 1958, in a small number of cases he received orders and money in response to his advertisements and did not either fill the orders or refund the money so received. Admitting that his business practices left much to be desired, appellant contends that, while civil liability may be established by his acts and omissions, it was not proved that said acts and omissions were the result of a scheme or artifice to defraud inasmuch as he lacked the intent necessary to justify a conviction under the statutes he was charged with violating. Appellant further contends that the Honorable Jacob Weinberger erred when he rejected, on the ground of an insufficient supporting affidavit, appellant's motion under Rule 17(b), Title 18, U. S. C. A., to subpoena witnesses at the government's expense.

II.

The Court Erred in Denying on the Ground of Insufficiency of the Supporting Affidavit Appellant's Motion Under Rule 17(b), Title 18, U. S. C. A., to Subpoena Witnesses at Government Expense.

Appellant first assigns as error the action of the Honorable Jacob Weinberger, United States District Judge, in denying appellant's motion made under Rule 17(b), Title 18, U. S. C. A., to subpoena certain witnesses at the government's expense [Clk. Tr. 43]. Generally speaking, the granting of a motion under Rule 17(b), *supra,* is a matter left to the discretion of the trial court and in the absence of an abuse of that discretion the appellate court will not disturb the discretion of the trial judge. This Honorable Court recognized this rule in

> *Dupuis v. United States* (C. C. A. 9th, 1925), 5 F. 2d 231,

in which it was stated:

> "That the matter of such procurement was within the discretion of the court is both statutory and settled by the courts. Rev. Stat. §878 (Comp. St. §1489); *Goldsby v. U. S.,* 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343; *O'Hara v. U. S.,* 129 F. 551, 64 C. C. A. 81."

See also:

> *Meeks v. United States* (9th Cir., 1950), 179 F. 2d 319, 322;
>
> *Austin v. United States* (C. C. A. 9th, 1927), 19 F. 2d 127, 129, *cert. den.,* 175 U. S. 523, 48 S. Ct. 22, 92 L. Ed. 405;
>
> *Gibson v. United States* (C. C. A. 8th, 1931), 53 F. 2d 721, 722.

The above-stated rule is too firmly seated to admit argument. Appellant does not claim here that the court below abused its discretion in making a factual determination of appellant's motion. Appellant does claim, however, that the Honorable District Judge erred, as a matter of law, when he held that appellant's affidavit in support of said motion was insufficient to establish appellant as one of the class of persons contemplated by Rule 17(b), Title 18, U. S. C. A., *supra*, and upon the alleged insufficiency of said affidavit denied the motion. Thus this assignment of error concerns itself, not with whether the court abused its discretion in weighing evidence presented to it relative to the materiality of, or the necessity for, the testimony of the proposed witnesses or the extent of appellant's assets, but rather it concerns iself, as a matter of law, with the basic legal sufficiency of appellant's affidavit in support of his motion.

In a phrase, appellant maintains that, while the District Court may have discretion in determining the facts, it has no unfettered discretion in the interpretation of a purely legal question.

Turning to the wording of Rule 17(b), Title 18 U. S. C. A., it is therein provided in pertinent part:

> "(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness."

The hearing on the motion in question was had before the Honorable Jacob Weinberger, who was incidentally not the trial judge, on June 5, 1958, in San Diego. Appellant, in accord with the provisions of Rule 17(b), *supra,* supported his motion with an affidavit [Clk. Tr. 19-23] which provided in material portion:

"ERIC O. SONNTAG, being first duly sworn, deposes and says:

"1. That he is the defendant in this case and makes this affidavit in his behalf pursuant to Rule 17(b) of the Federal Rules of Criminal Procedure.

"2. That he believes that he does not have sufficient means and is actually unable to pay the costs of process and the fees for attendance of the following named witnesses at the forthcoming trial of this action. His reasons for said belief shall hereinafter be made to appear.

"3. That he has heretofore incurred expenses in his defense herein which have seriously affected his financial position; said expenses have included a bail bond and attorney's fees.

"4. That while he is engaged in the wholesale and retail pet shop business in the city of Los Angeles, he has experienced financial difficulties in the operation of said business and he does have a number of creditors in said business.

"5. That the cash at his disposal is approximately $300.00; to use this cash would jeopardize seriously the *the* operation of said business and his personal living; that he does not own or have an interest in any real property; that he did recently receive a sum of money from the sale of real property in Germany, but that the proceeds of said sale so received by him had been disbursed before the need for said witnesses was made known to him.

"6. That he has discussed the meaning of the phrases 'does not have sufficient means' and 'is actually unable to pay,' as used *insaid* Rule, with his attorney and that his attorney has advised him that in his opinion said phrases do not require that a defendant be an actual indigent in order to obtain the beneficence of said Rule; that affiant does not believe that he is an actual indigent nor a pauper, but he does believe that he has not the means and that he is not actually able to pay for said mileage and fees within the meaning of said Rule as so explained to him by his attorney."

The affidavit then sets out the names and addresses of 10 proposed witnesses and the testimony which each was expected to give if called and concludes [Clk. Tr. 22]:

"8. That he will have witnesses at said trial who reside in the Los Angeles area; that he will provide the costs for the attendance of said witnesses at his own expense; but that he cannot afford to provide for the attendance of witnesses from other areas of the United States.

"9. That the testimony of each of the aforesaid witnesses is material to defendant's defense in that this is a prosecution for using the mails to defraud the theory of the pr*osectuion's* case is that defendant took orders for pets through the mails and intentionally failed to fulfill said orders, keeping the money given upon said orders for himself; the aforesaid testimony will tend to rebut said theory in that it will show that he had no such intent and that he had no scheme or device to defraud by use of the mails.

"10. Defendant states that he cannot safely go to trial without the testimony of each of the aforesaid witnesses at his said trial."

After preliminary discussion regarding the theory of the case the court read Rule 17(b), *supra* [Tr. A-9], and questioned whether appellant's affidavit *prima facie* brought him within the class of persons (indigent defendants) mentioned therein [Tr. A-10]. After the affidavit was read in part into the record [Tr. A-10 to A-12], the court remarked [Tr. A-14]:

> "* * * I think we ought to know more about the condition. I will say this: *It appears to me that just on the face of the situation now that your affidavit is not sufficient to give the Court the information that he is an indigent and that he comes within this rule.*" (Emphasis added.)

Subsequently the following colloquy occurred between defense counsel and the court [Tr. A-17]:

> "The Court: I don't know whether the defendant in this case is a millionaire or whether he is a pauper. In fact, as you stated in the affidavit—
>
> Mr. Zinman: But I have answered—
>
> The Court: —he was able to—and all that. Those are all conclusions.
>
> Mr. Zinman: I have also alleged *he doesn't have more than $300 at his disposal.*
>
> The Court: That doesn't mean anything, 'at his disposal.' He may have means. He may have a business that is of considerable value * * *" (Emphasis added.)

and again at page A-27 of the transcript:

> "The Court: I am not satisfied that you have complied with the rule.
>
> * * * * * * * *
>
> The Court: You do as you want to do. But when you state that you will rest upon your affidavit,

that is up to you. I will determine the matter whichever way you decide to proceed. But I don't think that the present situation, as you have stated in your affidavit, that it is sufficient and complies with the rule."

In denying appellant's motion, the court stated [Tr. A-32]:

"The Court: The defense counsel has appeared in court with his client, the defendant, but has declined to have his client take the stand and give testimony as to his financial condition. The Court is of the opinion that the defendant's affidavits have failed to establish that he is an indigent; that he does not have sufficient means; and that he is actually unable to pay the fees of the witnesses mentioned in his motion and affidavit. He has failed by either affidavit or by oral testimony, which he has been given the opportunity to adduce, to bring himself within the provisions of Rule 17 or within the provisions of the opinions cited by his counsel: Adkins versus DuPont Company, 335 U. S. 331-339.

The defendant's motion is denied."

In passing it may be noted that the Honorable Jacob Weinberger was in error in his statement that appellant's counsel had declined to allow his client to take the stand for examination on his financial situation [Tr. A-32 to A-33]. At page A-17 of the transcript appellant's counsel offered to allow appellant to take the stand for questioning by the court, the sole restriction being that the court and not the prosecutor should conduct the questioning.

From the foregoing it is clear that appellant's motion was denied because the court felt that the supporting affidavit was, as a matter of law, insufficient to establish

appellant as an "indigent defendant" entitled to the benefits of Rule 17(b), Title 18, U. S. C. A., *supra.* The questions of the materiality and the necessity of the testimony of the proposed witnesses set forth in the affidavit were never reached. Appellant contends that the affidavit was sufficient in that it did establish him as an indigent within the meaning of Rule 17(b) and that, accordingly, the court erred in denying the motion on the ground that indigency was not shown.

An examination of the affidavit in question clearly shows compliance with all the requisites of Rule 17(b), *supra:*

The rule requires that the name and address of each witness be stated. The affidavit conforms to this requirement, naming 10 witnesses and stating their addresses [Clk. Tr. 20-22]. The rule requires that the affidavit set forth the testimony each witness will give if subpoenaed. Again the affidavit complies with this requirement, setting out the expected testimony with particularity [Clk. Tr. 20-22]. The rule further requires that the affidavit show the expected testimony to be material to the defendant's defense. This requirement is met in paragraph 9 of the affidavit [Clk. Tr. 22] wherein it is explained in detail how the expected testimony will serve to establish defendant's lack of intent to defraud by use of the mails. The rule next requires that the affidavit contain a statement that the defendant cannot safely go to trial without said witnesses. Paragraph 10 of the affidavit [Clk. Tr. 23] states in this regard:

> "* * * Defendant states that he cannot safely go to trial without the testimony of each of the aforesaid witnesses at his said trial."

The final and, for the purposes of this brief, most important requirement of the rule is that—

> "The motion * * * shall be supported by affidavit in which the defendant shall state * * * that the defendant does not have sufficient means and is actually unable to pay the fees of the witness."

Paragraph 2 of the affidavit [Tr. A-19] states in the statutory language defendant's inability to secure the attendance of the witnesses. Additionally, paragraphs 3, 4, 5, and 6 [Clk. Tr. 19-20] set out specific reasons relating to his financial condition which show further why he is unable to pay for the travel of the witnesses. Clearly all of the requirements set out in Rule 17(b) were met by appellant's affidavit in support of his motion.

It is submitted that the Honorable District Judge labored under a misapprehension as to the degree of financial inability which must be shown to classify a person as an indigent defendant within the meaning of Rule 17(b), *supra*. A person need not be a pauper to be indigent. Comparatively speaking, a pauper is without funds or assets of any kind and is normally dependent upon charity for the provision of the bare necessities of life; while an indigent, as the term is used in the statutes relating to indigents, is one who is without sufficient means to make the payment he seeks by his petition to avoid and still provide for those who can legally claim his support. "Indigence" is compared to "poverty" in Webster's Dictionary of Synonyms, First Edition, 1951, page 636, as follows:

> "Poverty, the most comprehensive of these terms, may imply either the lack of all personal property or possessions * * * or it may imply resources so limited that one is deprived of many of the necessities and

all of the comports of life * * * Indigence * * * does not suggest dire or absolute poverty, but it always implies reduced or straitened circumstances and therefore usually connotes the endurance of many hardships and the lack of comforts; * * *"

In

Goodall v. Brite (1936), 11 Cal. App. 2d 540, 54 P. 2d 510,

the court in defining the word "indigent" in connection with the admissions to county hospitals stated at page 515 of the Pacific Reporter:

"Applying this definition to the instant case, we hold that the word 'indigent,' when used in connection with admissions to county hospitals, includes an inhabitant of a county who possesses the required qualifications of residence, and *who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support.*" (Emphasis added.)

Citing:

Dupue v. District of Columbia, 45 App. D. C. 54, Ann. Cas. 1917E, 414;

In re Hybart, 119 N. C. 359, 25 S. E. 963;

Massachusetts Gen. Hospital v. Inhabitants of Belmont, 233 Mass. 190, 124 N. E. 21;

People v. Board of Supervisors, 121 N. Y. 345, 24 N. E. 830.

See also:

21 Words and Phrases 152, 153;

42 C. J. S. 1363.

Thus the fact that appellant had a pet shop business and $300.00 in cash does not preclude him from the

status of an indigent if the expenditures of the funds necessary to bring the witnesses to the trial (estimated by the government to be from $3,000.00 to $4,000.00) [Tr. A-15] would disable him from "providing for those who legally claim his support." The affidavit establishes this to be the case.

The instant case is one of first impression on the requisites of an affidavit to establish indigence for a motion under Rule 17(b), *supra*. However, it is submitted that a somewhat analogous situation is presented by cases testing the sufficiency of affidavits filed in support of *forma pauperis* motions taken under Title 28, U. S. C. A. 1915, which provides in pertinent part:

> "(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress."

Even though that section by definition (use of the word "pauper") would logically raise a more stringent standard of requisite impecuiosity than would Rule 17(b), it has been conclusively established that the plaintiff's destitution is not a prerequisite for proceeding in *forma pauperis*.

In

> *Adkins v. E. I. Dupont de Nemours & Co.* (1948), 335 U. S. 331, 93 L. Ed. 43,

the Supreme Court, in discussing the sufficiency of affidavits filed in support of a motion to appeal *in forma*

pauperis, stated at page 339 of the United States Report, page 49 of the Lawyer's Edition:

> "* * * We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. *We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'* To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. * * * Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution. We think a construction of the statute achieving such consequences is an inadmissible one." (Emphasis added.)

The court also held in the same case that pauper's affidavits drawn in statutory language were ordinarily acceptable, stating at page 339 of the United States Report, page 48 of the Lawyer's Edition:

> "Consequently, where the affidavits are written in the language of the statute it would seem that they should ordinarily be accepted, for trial purposes, particularly where unquestioned and where the judge does not perceive a flagrant misrepresentation." (Emphasis added.)

See also cases collected in the annotation in 6 A. L. R. 1281, *et seq.*

In the light of the foregoing it is clear that "indigent defendants" within the meaning of Rule 17(b), Title 18, U. S. C. A., are, of necessity, persons who are not entirely destitute; but rather the rule includes within the term "indigent" those persons who, if not granted the relief prayed for in their motion, will be forced for practical monetary considerations either to forego the testimony of the necessary witnesses they desire or by bearing the cost of producing said witnesses deprive themselves and their dependents of support to which they are entitled. *A fortiori* appellant's supporting affidavit which was drawn largely in the language of the rule was sufficient to establish him as an indigent. He stated in paragraph 2 [Clk. Tr. 19] that he "does not have sufficient means and is actually unable to pay the costs of process and the fees for attendance of the following named witnesses at the forthcoming trial of this action." In paragraph 4 [Clk. Tr. 19] of the affidavit, he alleged that, while he was engaged in the wholesale-retail pet shop business in the City of Los Angeles, "he has experienced financial difficulties in the operation of said business and he does have a number of creditors in said business." Finally, in paragraph 5 [Clk. Tr. 19-20], he stated, "That the cash at his disposal is approximately $300.00; to use this cash would jeopardize seriously the operation of said business and his personal living; that he does not own or have an interest in any real property; * * *"

Appellant was an indigent as the term is used in Rule 17(b), and the court below erred in denying his motion when said denial was based on the supposed insufficiency of the supporting affidavit. That the dereliction of the court in denying appellant's motion affected substantial rights of the appellant within the meaning of Rule 52, Title 18, U. S. C. A., is clear from a review of the record:

As heretofore stated, appellant's aforesaid affidavit set out, in conformance with the requirements of Rule 17(b), *supra,* the names and addresses of 10 witnesses. As soon as said affidavit was served upon counsel for the government, the government availed itself of its vast investigative resources and had the proposed witnesses (who resided at various points from Michigan to California) [Clk. Tr. 20-22] interviewed by the postal inspectors [Tr. A-17, A-23, A-24]. After the court denied appellant's motion to produce said witnesses at the government's expense, appellant was unable because of financial considerations to obtain the testimony of said witnesses in any way other than by stipulation. Accordingly, appellant was forced to enter into stipulations with the government in which appellant stipulated to the testimony of 22 government witnesses, and the government stipulated to the testimony of appellant's 10 requested witnesses [Clk. Tr. 55-85]. These stipulations in greater portion were read into the record at the time of trial as previously stated at page 6 of this brief [Tr. 8-82, 312-321]. The stipulated testimony of the government's witnesses is contained in the transcript from page 8 through 82.

The stipulation, as drawn and read into the record, stipulated only that the witnesses would be deemed to have testified as therein set forth. With the exception of stipulated facts separately set out, the truth of the testimony was not stipulated, all objections other than those going to foundation of documents being reserved. At only one point in the stipulation of the testimony of the government's witnesses was there any cross-examination stipulated. The reason for this was, of course, that the appellant, lacking the resources of the government, could not afford to interview in advance of trial 22 government witnesses who lived in all parts of the country. In

addition, only nine of twenty-two government witnesses were named in the indictment; the remaining thirteen were used for the purpose of showing similar acts. Thus, up to the time of the stipulation, appellant had no knowledge of the identity of the other witnesses. The result was a classic illustration of the legal truism that, "You can't cross examine a paper record." That the government was not under the same disability is immediately apparent from a brief review of the appellant's stipulation [Tr. 312-321] where appellant stipulated to cross-examination for six of his ten witnesses.

By reason of the court's failure to grant appellant's motion under Rule 17(b), *supra,* he was put in the untenable position of stipulating on the government's terms or going to trial without the testimony of his witnesses. There could be but one answer to this choice and the stipulations were the result. The net effect of the court's denial of appellant's aforesaid motion was effectively to deprive appellant of his right to cross-examination of a majority of his accusers, all to his great prejudice.

In recapitulation of appellant's position on this point, appellant's affidavit complied with the requirements of Rule 17(b), *supra.* It set out the names and addresses of the witnesses and a résumé of the proposed testimony of each. It stated that the testimony of each of the witnesses was material to his defense and stated in what way such materiality existed. It stated that defendant could not safely go to trial without the testimony of the witnesses. Finally, it stated that appellant did not have the means to pay the costs of process and fees for attendance of the witnesses; that, while he had a business, the business was in debt; and that the cash at his disposal was approximately $300.00, the use of which

would seriously jeopardize his livelihood and that of his family. Since the affidavit was sufficient, the court erred when it denied the motion basing its denial on the insufficiency of the affidavit. The error was material and affected substantial rights of the appellant as the net result of the court's action was to force appellant into an unfavorable stipulation depriving him of the opportunity to confront and cross-examine his accusers. This was plain error and should be reversed.

III.

Certain of the Findings of Fact Are, in Light of the Evidence, Clearly Erroneous and Must Be Reversed in That the Evidence, Considered as a Whole, Is as Consistent With Innocence as With Guilt.

This section of the argument is devoted to an attack by appellant on the trial court's findings of fact. It is contended that, although certain of the findings have some support in the evidence, they are clearly erroneous in that the evidence upon which they are based is at least as consistent with the theory of innocence as it is with the theory of guilt.

Unlike the sacrosanctity accorded by appellate courts to the findings of administrative tribunals and juries, the findings of a trial court and the evidence in support thereof are, when attacked, open to review on appeal. If, upon a review of all the evidence, the reviewing court is left with a definite conviction that although there is evidence to support each of the findings a mistake has been made, the reviewing court must reverse. A trenchant exposition of this rule was made by the Supreme Court in

United States v. United States Gypsum Co. (1948), 333 U. S. 364, 92 L. Ed. 746,

wherein it was stated at page 766 of the Lawyer's Edition of the United States Report:

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

See also:

United States v. Oregon State Medical Soc. (1952), 343 U. S. 326, 96 L. Ed. 978;

Gamewell Company v. City of Phoenix (9th Cir., 1954), 216 F. 2d 928;

Alaska Freight Lines v. Harry (9th Cir., 1955), 220 F. 2d 272.

The above-stated rule has particular applicability to a case such as the instant case where the major portion of the testimony was introduced by stipulation and read into the record by counsel. In such a situation the trial court possesses no advantage over the reviewing court in that the decision at the trial level was based largely

on paper testimony and the traditional advantage of the trial judge of observing the witnesses' demeanor was not present. On the other hand, the reviewing court has certain advantages not available in such a case to the trial court. There are two additional judges to consider the testimony and, in addition, the reviewing court is not impelled to action by the necessity for quick decision but can take sufficient time to deliberate on all aspects of the problem. In the aggregate, where the testimony is introduced by stipulation at trial level, the qualifications of the reviewing court to evaluate properly the evidence are superior to those of the trial judge. As expressed in

5A C. J. S. 575, 576:

> "It is often held that the appellate court is not bound by the trial court's findings but may make an original examination of the evidence as contained in the record and make an independent decision on the factual questions where the evidence on which the findings of the trial court are based is entirely or largely documentary, or the testimony of witnesses, which instead of being given orally with the witness before the court, has been reduced to, and presented to the court in the form of, a written statement or record, such as an affidavit, deposition, or report or transcript of testimony previously given; and this is so although no declarations of law were asked and given or refused.
>
> "The reasons given for this rule are that under such circumstances the appellate court is in just as good a position as the trial court to form a just estimate of the credence to be given to an examination of the case."

See also cases collected in Note 80, page 575, of 5A Corpus Juris Secundum.

There are 17 findings of fact herein which are contained in the Clerk's Transcript at pages 104-111. Since there is no objection to Finding of Fact I, Findings II through XVII, inclusive, are hereinbelow digested *seriatim* and, in conformity with Rule 18(d) of this Honorable Court, their objectionable aspects particularized.

Finding II is an omnibus finding alleging the existence of a scheme and artifice as alleged in each of the 11 counts of the indictment. This finding provides [Clk. Tr. 104-105]:

> "Prior to on or about January 26, 1955 and continuing to on or about February 19, 1958, defendant ERIC O. SONNTAG wilfully devised and executed a scheme and artifice substantially as charged in Count One of the indictment and likewise as so re-incorporated by reference in each of the subsequent counts of the indictment."

Appellant contends said finding is clearly erroneous in so far as it finds any scheme or artifice to defraud devised or executed by him.

Finding III sets forth the intents and purposes of the alleged scheme and artifice [Clk. Tr. 105]:

> "Said scheme and artifice was wilfully devised and executed by defendant ERIC O. SONNTAG (1) to defraud persons who desired to purchase pets, animals, birds, and reptiles, and persons who owned and operated stores and shops selling pets, animals, birds, and reptiles, and those persons and shops specifically named in each count of the indictment; and (2) to obtain money and property from said persons and shops by means of false pretenses, representations, and promises which defendant ERIC O. SONNTAG, well knew at the time would be false when made."

This finding is clearly erroneous in so far as it finds the existence of any scheme or artifice by appellant to defraud or obtain money from the named persons by false representations, pretenses, and promises.

Finding IV explains the workings of the alleged scheme. It provides [Clk. Tr. 105-106]:

> "Said scheme and artifice contemplated use of the mails and consisted of the following:
>
> "(1) defendant ERIC O. SONNTAG, caused to be placed in nationally distributed magazines, including 'All Pets Magazine,' 'Popular Mechanics Magazine,' and 'Billboard,' advertisements which offered pets, animals, birds, and reptiles for sale to the general public at specified prices;
>
> "(2) defendant ERIC O. SONNTAG caused to be mailed to the general public and to owners and operators of retail pet shops, throughout the United States, including the persons and shops named in the indictment, printed price lists offering pets, animals, birds and reptiles for sale at specified prices, some of which said price lists stated that the pets, animals, birds and reptiles advertised therein were in stock for immediate shipment, and others of which promised to refund any deposit made on submitted orders which defendant ERIC O. SONNTAG was unable to fill within 45 days of his receipt thereof;
>
> "(3) at the time said advertisements were caused to be placed and mailed by defendant ERIC O. SONNTAG, as aforesaid, defendant ERIC O. SONNTAG as he then and there well knew, did not intend to ship to the persons who ordered same, the pets, animals, birds and reptiles which he so advertised and did not intend to refund deposits made on ordered pets, animals, birds, and reptiles not shipped within 45 days of defendant's receipt of said orders."

The advertising and mailing alleged in paragraphs (1) and (2) of Finding IV are admitted; however, appellant maintains that paragraph (3) of the finding is clearly erroneous in alleging the existence of a scheme or artifice to defraud pursuant to which alleged scheme and artifice appellant is alleged to have intended, at the time of placing said advertising alluded to in paragraphs (2) and (3), not to ship the ordered animals and not to make refunds of money received with said orders.

Finding V finds that appellant mailed a letter to Mark Champlin for the purpose of executing said alleged scheme and artifice to defraud. This finding relates to count one of the indictment [Clk. Tr. 2] and provides [Clk. Tr. 106]:

> "That, with respect to Count One of the indictment, on the 31st day of March, 1955, in Los Angeles County, California, defendant ERIC O. SONNTAG, for the purpose of executing the aforesaid scheme and artifice, and attempting so to do, caused to be placed in an authorized depository for mail matter a letter addressed to Mark Champlin Zoo, Indianola, Iowa, R.R. 3, to be sent or delivered by the Post Office Establishment of the United States."

Appellant admits the mailing as found but contends that in so far as the finding purports to find the existence of a scheme or artifice to defraud by appellant it is clearly erroneous.

Findings VI through XV relates respectively to counts one through eleven of the indictment [Clk. Tr. 3-9] and, with the exception of names, dates, and description of the particular use of the mails, are identical to Finding V, *supra*. In each case, appellant admits the act of using the mails but urges that each of said findings is clearly errone-

ous in so far as it purports to finding the existence of a scheme or artifice to defraud on the part of appellant.

Finding XVI provides [Clk. Tr. 111]:

> "The plaintiff, UNITED STATES OF AMERICA, has established each and all of the foregoing findings of fact, and each count charged in the indictment beyond a reasonable doubt."

This finding is "clearly erroneous" in so far as it finds that a scheme or artifice by appellant to defraud has been established in any of the preceding findings or as charged in the indictment.

Finally, Finding XVII finding appellant guilty as charged in counts one through eleven of the indictment [Clk. Tr. 2-9] is clearly erroneous inasmuch as the evidence upon review shows that there was extant no scheme or artifice to defraud on the part of appellant.

It will be noted from the foregoing that each of the above findings has as its basis the assumption that appellant's acts in advertising, mailing, etc., were motivated by some scheme or artifice to defraud. This was denied by appellant at the trial and is denied now. It is appellant's position that, while the various acts of advertising and mailing were performed by him and he did not furnish the ordered animals or rebate the money in certain of the cases, these acts and omissions, far from being the result of a plan to defraud, sprang from the inherent nature of the mail order pet business in conjunction with business reverses and lax business practices.

A review of the evidence will suffice to show the validity of appellant's position. In the interests of expedition, appellant will give a general survey of the various actions on his part which were testified to by the government's

witnesses and will state by way of footnote the places in the transcript at which such testimony may be found. Thirty-one witnesses were produced to prove the government's case. The testimony of twenty-two of these witnesses was offered by stipulation and, with the exception of the proposed testimony of proposed stipulation witnesses Elsinger and Coleman [Tr. 48-55] was so received. Nine witnesses, viz.: Youngclaus, Hockett, Pefley, Rye, Hagerman, Dooley, Morrison, Champlin, and Frankenfield, were indictment witnesses (*i.e.,* persons who had transactions with appellant as charged in counts one through eleven of the indictment). For the convenience of the court, appellant has included as Appendix A to this brief a chart listing the government's witnesses *seriatim* and designating the pages of the transcript at which various portions of their testimony is contained.

With the exception of witnesses Hunter (of "Popular Mechanics" magazine), Westenberg (of "All Pets" magazine), Chyrklund (of the Better Business Bureau), and Donovan (United States Postal Inspector, retired), all government witnesses testified substantially that they saw one of appellant's advertisements[1] advertising certain species of animals and birds "In Stock for Immediate Shipment" and that "Deposits may be refunded on orders which cannot be filled within 45 days";[2] that they sent an order accompanied by money through the mails to appellant;[3] that they received a reply from him acknowledging receipt of the order (in some cases);[4] that they did not receive the pets ordered; and that in all but three cases the money was not restituted.[5]

In addition to the foregoing witnesses, the government produced witnesses Hunter [Tr. 83-98] and Westenberg

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Footnotes 1 through 5 appear on pages 59 to 61, for convenience of Court.

[Tr. 98-104], representatives of "Popular Mechanics" and "All Pets" magazines respectively, each of whom testified that during the year, 1955, advertisements were placed with their magazines by appellant. Witness Chyrklund, a representative of the Better Business Bureau, testified on behalf of the government [Tr. 227-243] presumably for the purpose of proving that his organization had received complaints about the appellant. However, the court refused the government's offer of proof, and the testimony of this witness adds nothing. Witness Donovan, a retired postal inspector, testified on behalf of the government that he was assigned to investigate complaints made against appellant [Tr. 245-246]; that he discussed complaints with appellant on three occasions and talked to him via telephone on several others; that appellant had told him that he was in financial straits and was conducting the business largely himself and with what help he could get from his wife and part-time workers [Tr. 251]; that appellant promised to adjust the complaints [Tr. 252-253, 256, 259, 263-267]; that he verified with Pan American Airways the fact that they refused to carry further shipments of monkeys [Tr. 276]; that appellant furnished him with evidence of adjustments [Tr. 257, 268-269]; that he told appellant that in view of his promise to adjust the complaints the Post Office Department was not in a position to do anything about it [Tr. 260]. Testimony of witness Donovan concluded the government's case in chief.

The appellant introduced a stipulation as to the testimony of witnesses Hilton, Harlow, Baker, Campbell, Owens, Gilmore, Olbrich, Robison, Baird, and Utley. Each of these witnesses testified to the effect that at some time during the indictment period they had placed an order with appellant for various pets and had received

them. Stipulated cross-examination revealed that in some instances the orders had been filled only after the witnesses had made inquiry concerning same and that some witnesses were not satisfied with the pets received [Tr. 312-321].

Witness Thompson, called on behalf of appellant, testified that he had purchased pets, birds, and animals of various kinds from appellant over a five-year period; that he had made such purchases from him during the years, 1955, 1956, and the first portion of 1957 [Tr. 323]; that at no time did appellant fail to fill an order for him [Tr. 323-324]; and that appellant's prices were competitive with those of other firms [Tr. 333-334].

Witness Matute testified on behalf of appellant that he was an executive with Pan American World Airways; that in 1955, 1956, and 1957 he was in charge of inbound and outbound cargo at the Los Angeles International Airport; that the word "cargo" included livestock [Tr. 351]; that Pan American had shipped livestock at the request of appellant and had shipped livestock consigned to appellant during the years, 1955, 1956, 1957; that from October, 1955, on, Pan American put an embargo on the transportation of certain types of livestock, particularly monkeys [Tr. 352]; that the embargo did not cover cargo planes [Tr. 355] but that shipments of monkeys from South America had to be carried, if at all, by passenger plane [Tr. 357].

Appellant testified in his own behalf that he had been engaged in the livestock importation, exportation, retail, and wholesale business in Los Angeles for 10 years [Tr. 362-363]; that in the course of his business he advertised in magazines with nationwide circulation and had also used direct mail advertising [Tr. 363-364]; that during

the years, 1955, 1956, and a portion of 1957 he had occasion to refund moneys in excess of $1,000 to persons whose orders he had not been able to fill (for the convenience of the court appellant has set out in Appendix B to this brief a schedule of persons to whom he has refunded money) [Tr. 365-383]; that during the period covered by the indictment he had successfully consummated numerous business transactions for pets, a number of which he itemized [Tr. 384-397]. In this connection it should be noted that following considerable itemization of these transactions the court, taking cognizance of the fact that appellant had just begun to exhaust his file of such transactions, requested that in the interest of expedition some other arrangement be made to get the evidence of appellant's successful business dealings into the record [Tr. 397-399]. In response to the suggestion of the court, appellant's business records were offered and received in bulk [Tr. 401-402]. Appellant further testified that in the year, 1955, the gross dollar amount of his business was $39,626.87 [Tr. 402]; that in the year, 1956, the gross dollar volume of his business was $31,078.37 [Tr. 404]; that for the first two months of the year, 1957, the gross dollar volume of his business was $4,102.96 [Tr. 405]; that in each of the aforementioned periods mail orders accounted for approximately one-third of the transactions and about 50 percent of the gross dollar volume of business [Tr. 403-405].

Appellant explained his failure to fulfill orders or refund money to certain of the government's witnesses. In this connection he stated that as to government witness Champlin the order was for 8 female Rhesus monkeys; that Rhesus monkeys are difficult to obtain; that he did not have 8 females at the time he received the order; that he

made efforts to obtain them; that he offered to ship Java monkeys; that upon the receipt of Champlin's order it was his intention to fill it or return the money but that by the time he ascertained the order could not be filled he was in financial straits and did not have the money available to send back [Tr. 406-412].

As to witness Hockett, appellant stated that he had had prior successful dealings with said witness; that he received an order for 2 pairs of exotic finches from said witness; that he did not have the finches in stock at the time he received the order; that he did unsuccessfully attempt to fill the order; and that he did not refund the money because he did not have it [Tr. 412-416, 419].

As to witness Youngclaus, appellant testified that he received said witness' order for 3 monkeys; that he was unable to furnish the monkeys because of the aforesaid airline embargo; that he had in lieu of the monkeys sent him other animals; and that he, at the time of the trial, had discharged his obligation except for $2.50 [Tr. 424-426].

As to witness Dooley, appellant testified that he did not fill her order for a Mynah bird; that he intended to fill the order, but when it was received there were no Mynah birds available [Tr. 427]. As to witness Hagerman, appellant testified that he had not filled said witness' order for a monkey, no explanation being brought out for this neglect [Tr. 427-430].

As to witness Morrison, appellant testified that he had received an order from said witness for 3 monkeys; that he did not send the monkeys nor did he refund the money, that his reason for not sending the monkeys was the aforesaid airline embargo; that when he received the order he intended to fill it; that he did not refund the money be-

cause he did not have any money to refund at the time he found he could not supply the monkeys [Tr. 430-432].

As to witness Pefley, appellant testified that he received an order from said witness for guinea pigs and chipmunks which was not filled by him; that chipmunks were not available at the time the order was received because the supply is dependent upon the part-time activities of private persons and as a result is uncertain; that the chipmunks could be sent by mail but guinea pigs are not accepted by any other carrier than railway express or air express which are too expensive considering the value of the animal; that without the chipmunks to defray the cost of shipment it would be impracticable to ship them [Tr. 432-434].

As to witness Rye, appellant testified that he received an order for a 2 pairs of golden hamsters and 2 chipmunks; that he did not fill the order nor did he refund the money because of lax business practices in that the order "just got beneath the urgent orders" [Tr. 432-434].

As to witness Frankenfield, appellant testified that he received an order for 2 chipmunks which he did not fill; that he did not refund the money and that the reason for his neglect was overwork in that he forgot the order [Tr. 435-437]. As to witness Coon, appellant testified that he received an order for 4 different kinds of monkeys; that he made an attempt to fill the order; that he did not send the monkeys and did not refund the money; that he offered to fill the order about 6 months after receipt but said witness insisted on a refund at that time; that he felt that if he closed his business all of the persons he owed money to would lose their money [Tr. 438-439].

As to witness Cameron, appellant testified that he owed said witness considerable money for various pets "mostly parrots"; that he had at the time of the trial paid him all

of the money due and owing; that said witness had filed an action against him in the small claims court to compel payment [Tr. 439-440].

As to witness Beagle, appellant testified to the writing of the letter of explanation to said witness [Deft. Ex. G, Tr. 440-441].

As to witness Weeks, appellant testified that he received an order which he had not filled; that he had partly repaid the amount due and owing and was at the time of the trial paying $5.00 a week on said obligation to a collection agency [Tr. 442].

Appellant further testified that he came to this country from England in 1947; that he borrowed $500.00 from his mother to commence his business [Tr. 419]; that the business eventually developed into a wholesale business; that he started importing and exporting regularly; that various problems kept arising which affected the financial status of the business [Tr. 420-421]; that Pan American Airlines placed an embargo on monkey shipments thus cutting off his source of supply [Tr. 421-423]; that the business had not been profitable enough to support a large stock; that he had difficulties in obtaining employees; that he worked 7 days a week, 52 weeks a year [Tr. 423-424]; that he felt very bad about owing money to people; that he had never intended in his life to keep money that did not belong to him [Tr. 424]; that, if he had a plan or intent to defraud anyone, he would not work out a plan "to deceive people of $4.00 and $5.00 and $5.50, even to the total amount of $600.00 or $800.00"; that nobody invents a plan and works unprofitably at it for 7 days a week; that he still works hard at the busines to make it a success [Tr. 444-445]; *that he never advertised anything that he did not have in stock at the time* [Tr. 449,

451, 455, 478]; that he had his price list printed to list all animals handled in the regular course of business; that some of the animals on the list would not be in stock from time to time; that said list did not have any inscription on it "In Stock for Immediate Shipment" [Tr. 467]; that he had, during the Pan American Airways embargo period, developed some additional sources of supply for South American monkeys [Tr. 471].

Of significance in this matter is appellant's statement covering his business difficulties wherein he said at page 460 of the transcript:

> "I would like you to understand the problem I have in a particular case like this. I admit it is bad business not to take better care of orders or have easier orders. You might call it bad business. I don't know. I am not sure. It isn't an ideal way of running a business and I wish I could change this one deal.
>
> "But the fact is here, Mr. Sherman, that I have here an order to ship, which I do myself. Every shipping box I let go out is made up by myself. It is figured up by myself and the food is put in by myself and I take great care that the animals arrive in perfect condition.
>
> "I would estimate that every shipping box, whether there are six turtles or a hundred hamsters or two monkeys, or whatever it is, that it takes me probably between—writing the bill of lading, nailing it shut, putting perches in for birds, it probably takes me between half an hour and one hour. I have never had my girls close these boxes. I do it myself. I am careful to put the label on so it doesn't get lost. You can see the amount of time that is involved."

In cases such as this one where the presence or lack of fraudulent intent is in issue, the state of mind of the defendant is seldom if ever proved by direct evidence, but rather it must be proved almost entirely by circumstantial evidence. As stated by this Honorable Court in

> *Remmer v. United States* (9th Cir., 1953), 205 F. 2d 277, 288:
>
> "A state of mind can seldom be proved by direct evidence but must be inferred from all the circumstances."

"Direct evidence" has been variously defined in 31 Corpus Juris Secundum 505-506 as—

> "* * * evidence which if believed proves the existence of the fact in issue without any inference or presumption"

as evidence which—

> "* * * describes disputed circumstances, leaving no room for deduction or inference"

and as meaning—

> "* * * that which immediately points to the question at issue, or is evidence of the precise fact at issue and on trial, by witnesses who can testify that they saw the act done, or heard the words spoken which constitute the facts to be proved."

See also:

> *Sullivan v. Mountain States Power Co.,* 139 Ore. 282, 9 P. 2d 1038;
>
> *Stern v. Employers' Liability Assur. Corporation Limited of London, England,* .... Mo. ...., 249 S. W. 739;
>
> Witkin, *California Evidence,* 131-132.

The following definition of circumstantial evidence is given in 31 Corpus Juris Secundum 871:

> "Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist."

Based upon the foregoing, it is apparent that the government's entire case was founded upon circumstantial evidence. Nowhere in the testimony is there any evidence "which if believed proves the existence of the fact in issue [fraud] without any inference or presumption." (31 C. J. S. 505, *supra.*) Appellant's guilt of the crime charged to him could be established from the foregoing testimony only by way of inference, thus coming within the foregoing definition of circumstantial evidence. The act of appellant in putting advertisements in magazines or sending them directly through the mails is not in itself indicative of fraud inasmuch as it is a normal action for any person engaged in a legitimate mail order business. This is not altered by the fact that the advertisements represented that the animals were "IN STOCK FOR IMMEDIATE SHIPMENT" and that "Deposits may be refunded on orders which cannot be filled within 45 days," these being representations which would regularly be used in any legitimate operation. The same may be said of the fact that appellant acknowledged by way of the mails the various orders received by him. Finally, appellant's failure to fill the orders of, or return the money to, the various government witnesses, while reprehensible, is not in itself conclusive of fraud. The exigencies of running a small under capitalized mail order business could well result in such failures without any intent to defraud on the part of appellant. It is only when all of these factors are considered together that the inference can be drawn therefrom

that, because of the number of transactions and the apparent *modus operandi,* they were the result of some scheme or artifice to defraud. Appellant's state of mind then is, from the standpoint of the government's case established inferentially and not directly.

The only direct evidence bearing on appellant's state of mind was supplied not by the government but by the defense itself. Appellant repeatedly denied that his actions were prompted by fraudulent intent and laid his failure either to fill the orders or rebate the money to the fact that at the particular time he was financially unable to do so [Tr. 406, 407, 411, 412, 416, 418-424, 425, 427, 431, 432-434, 435, 436, 437, 438, 439]. In addition, appellant stated that his only reason in using the mails to send advertisements was to do more business and that such action was not undertaken pursuant to any plan or scheme to defraud [Tr. 444-445]. These statements by appellant constituted as aforesaid direct evidence since, if believed, they prove appellant's state of mind in and of themselves directly and not by way of inference.

Appellant's testimony relative to his state of mind is uncontradicted by any direct evidence and is completely compatible with the theory of innocence which could be drawn from the government's circumstantial evidence. It, however, is completely inconsistent with the interpretation of guilt which was placed upon said circumstantial evidence by the court in finding appellant guilty as charged. In ignoring appellant's direct denial of fraudulent intent and in drawing by inference, from the government's circumstantial evidence, a theory of guilt, the trial court arbitrarily and capriciously disregarded uncontradicted direct evidence in favor of ambiguous circumstantial evidence. This was error.

It is established that uncontroverted evidence which is not improbable or unreasonable cannot be disregarded even if it comes from an interested witness; and, unless it is shown to be untrustworthy, it is conclusive. As stated in

32 C. J. S. 1089, *et seq.:*

"Uncontradicted or undisputed evidence should ordinarily be taken as true. More precisely, evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or capriciously discredited, disregarded, or rejected, even though the witness is a party or interested; and, unless shown to be untrustworthy is to be taken as conclusive, and binding on the triers of fact; * * *"

The foregoing statement of law is correlative to the rule that the existence of a fact may not be proved by circumstantial evidence which is consistent with uncontradicted direct evidence denying the existence of the fact. In such a case, the fact the existence of which is sought to be proved does not exist. A succinct statement of this rule is contained in

32 C. J. S. 1101-1102:

"* * * but circumstantial evidence is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion, or where the circumstances give equal support to inconsistent conclusions, or are equally consistent with contradictory hypotheses. *A fact cannot be established by circumstances which are perfectly consistent with direct, uncontradicted, and unimpeachable testimony that the fact does not exist.*" (Emphasis added.)

The rationale behind the foregoing rule is that circumstantial evidence proves the fact in issue only by inference.

A fact may be proved by inference when the inferences are not contradicted by direct and percipient evidence. Where even a scintilla of contradicting direct evidence is present, the inference must fall. In

Arnall Mills v. Smallwood (C. C. A. 5th, 1933), 68 F. 2d 57,

the court stated at page 59:

> "Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence."

In

Ariasi v. Orient Insurance Co., et al. (C. C. A. 9th, 1931), 50 F. 2d 548,

the defendant in error sought to show as a defense in the trial court that plaintiff in error had an unlawful intent in using certain insured property. The proof of this position was attempted by inference from circumstantial evidence. This Honorable Court, in rejecting the foregoing contention, stated at page 552:

> "The difficulty with this claim is that, although this conclusion was required, in the absence of any evidence to the contrary, the prima facie effect of the revocation is dissipated by positive evidence to the contrary. It does not constitute evidence to be placed in the scale, and weighed, as against the positive evidence of the plaintiff to the effect that he did not intend to violate the law and had not done so."

Pennsylvania R. Co. v. Chamberlain (1933), 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;

Winn v. Consolidated Coach Corporation (C. C. A. 6th, 1933), 65 F. 2d 256, 257.

The fact in issue here being appellant's state of mind, under the reasoning of the foregoing authorities, any inferences of fraudulent intent which might be drawn from the government's circumstantial evidence are completely and conclusively rebutted by the direct evidence of the appellant that he performed the various acts testified to by the government's witnesses in the normal innocent course of his business and not as a result of any fraudulent scheme, device, or artifice. The court below, therefore, committed error in inferring appellant's guilt from the government's circumstantial evidence, in complete disregard of appellant's direct evidence which, not only denied any fraudulent intent, but also was completely consistent with innocent inferences which could be drawn from the government's evidence.

As heretofore stated, the government's entire case was based upon circumstantial evidence. The various government witnesses testified to transactions with appellant in which many of them sent orders to appellant in response to his advertisements and received neither the ordered goods nor a refund of their money. From these facts the government by inference alleged, and the court below so held, that appellant's acts established a scheme or artifice on his part to defraud. Appellant on the other hand, while admitting the acts, explained that they were not the result of a scheme to defraud but merely the result of his financial inability to pay coupled with careless business practices. This latter inference could as easily be drawn from the testimony of the government witnesses as could the inference of guilt adopted by the court below. It is appellant's contention that the court in adopting the inference consistent with guilt and rejecting the inference consistent with innocence committed error. It is established beyond question that in cases such as the instant case, where guilt

is sought to be established by circumstantial evidence and the evidence is as consistent with innocence as with guilt, it is the duty of an appellate court to reverse a judgment of conviction.

While appellant has been unable to find any law on this point in the Seventh Circuit, the proposition is abundantly established in the other ten circuits including the Ninth Circuit. In

Ayala v. United States (C. C. A. 1st, 1920), 268 Fed. 296,

the First Circuit stated at page 300:

"* * * we do not think that, when inferences as consistent with innocence as with guilt may be drawn from the proven facts, it can be said that there was substantial evidence to support a verdict of guilty."

In

Nosowitz, et al. v. United States (C. C. A. 2d, 1922), 282 Fed. 575,

Judge Manton, speaking for the Second Circuit, stated at page 578:

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiffs in error."

In

Graceffo v. United States (C. C. A. 3rd, 1931), 46 F. 2d 852, 853,

it is said:

"It has been held by a long line of decisions in substance that, unless there is substantial evidence of

facts which exclude every other hypothesis other than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused. (Citing cases.)"

In

Garst v. United States (C. C. A. 4th, 1910), 180 Fed. 339,

the Fourth Circuit states at page 343:

"The rule in regard to circumstantial evidence is that all the essential facts and circumstances shown in evidence must be consistent with the defendant's guilt and inconsistent with every other reasonable hypothesis."

In

Kassin v. United States (C. C. A. 5th, 1937), 87 F. 2d 183,

the Fifth Circuit stated at page 184:

"Circumstantial evidence can indeed forge a chain of guilt and draw it so tightly around an accused as almost to compel the inference of guilt as matter of law. Again, circumstantial evidence may forge the chain and draw it tight by legally justifiable, rather than absolutely compelling, inferences. In each case, however, where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence."

The rule was succinctly enunciated by the Sixth Circuit in

Tucker v. United States (C. C. A. 6th, 1915), 224 Fed. 833, 837,

as follows:

> "* * * if we can say that the testimony, taken together, was as consistent with defendant's innocence as with his guilt it will be our duty to reverse."

More than any other circuit the Eighth Circuit has repeatedly relied upon the foregoing rule of law. Thus in

Salinger v. United States (C. C. A. 8th, 1927), 23 F. 2d 48, 52,

it is stated:

> "Unless there is subtstantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the accused."

The rule has been adopted by this circuit in

Ferris v. United States (C. C. A. 9th, 1930), 40 F. 2d 837,

wherein this Honorable Court stated at page 840:

> "Where, as in this case, circumstantial evidence is relied upon to support a verdict of guilty, all the circumstances so relied upon must be consistent with each other, consistent with the hypothesis of guilt, and inconsistent with every reasonable hypothesis of innocence."

Again in

Karn v. United States (C. C. A. 9th, 1946), 158 F. 2d 568,

Judge Bone, speaking for this Honorable Court, said at page 570:

> "The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt."

In

Paddock v. United States (C. C. A. 9th, 1935), 79 F. 2d 872, 875, 876,

this court stated:

> "The rule with reference to the consideration of circumstantial evidence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 Brickwood Sackett Instructions to Juries, §2491, et seq."

See also:

McLaughlin v. United States (C. C. A. 3rd, 1928), 26 F. 2d 1;

Grant v. United States (C. C. A. 3rd, 1931), 49 F. 2d 118;

Harrison v. United States (C. C. A. 6th, 1912), 200 Fed. 662;

Union Pacific Coal Co. v. United States (C. C. A. 8th, 1909), 173 Fed. 737;

Isbell v. United States (C. C. A. 8th, 1915), 227 Fed. 788;

Sullivan v. United States (C. C. A. 8th, 1922), 283 Fed. 865;

Willsman v. United States (C. C. A. 8th, 1923), 286 Fed. 852;

Grantello v. United States (C. C. A. 8th, 1924), 3 F. 2d 117;

Edwards v. United States (C. C. A. 8th, 1925), 7 F. 2d 357;

Bishop v. United States (C. C. A. 8th, 1926), 16 F. 2d 410;

Beck v. United States (C. C. A. 8th, 1929), 33 F. 2d 107;

Gold v. United States (C. C. A. 8th, 1929), 36 F. 2d 16;

Stoppelli v. United States (9th Cir., 1950), 183 F. 2d 391, dissenting opinion of Judge Denman, pp. 395-398;

Woodard Laboratories, Inc., et al. v. United States (9th Cir., 1952), 198 F. 2d 995;

Leslie v. United States (C. C. A. 10th, 1930), 43 F. 2d 288;

Douglas v. United States (D. C. Cir., 1956), 239 F. 2d 52;

23 C. J. S., Criminal Law, Sec. 907, pp. 151-152.

As heretofore stated, appellant's guilt was inferred in the court below from the following general facts: that he advertised animals for sale; that in his advertisements he stated that they were in stock for immediate shipment and that deposits might be refunded on orders not shipped within 45 days; that money was sent to the ap-

pellant; that the orders were not filled in some cases and in an even lesser number of cases the money was not refunded. While it is true that a fraudulent scheme could be inferred from such actions by appellant, it is at least equally true that these facts are susceptible to an inference consistent with innocence as urged by appellant.

To understand appellant's explanation that he intended to fill all of the orders and was prevented from so doing by business reverses and by stoppage of his source of supply it is necessary first to understand some of the problems peculiar to the operation of a mail order animal business. Any business which stimulates its sales by extensive advertising has a certain area of uncertainty as to just how great the response will be to any given advertisement. If, for instance, a person indulges in direct mail advertising, it is impossible to know whether 1 percent, 10 percent, or 50 percent of the persons circularized will order in reliance on the advertisements. In businesses where inanimate merchandise is being sold this problem, while important, is probably not too acute inasmuch as one could safely stock merchandise equal to the largest anticipated demand and, in the event that a lessor volume of orders was received than anticipated, could store the remaining stock until the next advertising campaign. This is not true where animate merchandise such as that handled by appellant is concerned. Obviously, if a person offers animals for sale by direct mail advertising or extensive advertising in periodicals and in response to the advertising campaign all or substantially all of the animals are not sold, the business assumes the overwhelming financial burden of feeding and caring for the animals in question until they can be disposed of by other means. Nor is this risk present in the normal retail pet shop operation. There sales depend upon direct contact. One either has

or does not have certain animals when the customer comes in the store. As a result the stock on hand can be kept to a bare minimum. Appellant, as a mail order stock dealer, was subject to the uncertainties of direct mail and periodical advertising. While he stated [Tr. 449] that *he never advertised anything that he did not have in stock at the time of the advertisement,* there was always a considerable area of dubiety as to the response which would result. Appellant, having 10 monkeys in stock and advertising monkeys as being in stock for immediate delivery, might receive 100 orders or he might receive no orders. The solution to this problem which was adopted by appellant was to fill the orders to the extent of his available stock and, in the event of a surplus of orders, rely upon his established sources to augment his depleted stock.

Therefore, when appellant was sold out of certain advertised animals and he received additional orders for the same, it did not follow that he would not be able to fill the orders either through his primary source of supply or through other purchases. In the normal course of his business, under such circumstances he would deposit the payment received with the order and then attempt to replenish his stock to fill the order. While this may leave something to be desired as far as business methods are concerned, his failure in some cases either to fill the order or rebate the money was the result of poor financial condition and not of a fraudulent scheme or device. It is, of course, established that the good faith of the defendant is a complete defense to a charge of mail fraud.

Durland v. United States (1896), 161 U. S. 306, 40 L. Ed. 709;

Gold v. United States (C. C. A. 8th, 1929), 36 F. 2d 16, 32.

Basically the major *indicium* relied upon by the government to show fraud on the part of appellant is appellant's failure to make restitution on unfilled orders. A similar situation was presented in

Harrison v. United States (C. C. A. 6th, 1912), 200 Fed. 662, *supra,*

in which the Sixth Circuit, speaking of the defendant's advertising promises, stated at page 670:

> "Accordingly he thereupon, and about July, 1908, changed his literature so as to contain this absolute promise of refund, and (with such degree of approval from the Post Office Department as may be implied from these facts) he continued to use this literature until his arrest. In other words, it appears that, even if there might be any intent to get the purchaser's money by creating a misleading impression regarding the article to be received by him, it was accompanied by a promise, and by the legal liability to return the money, if, when the purchaser saw the article, he was not satisfied. We quite agree with the Post Office Department that *this promise to refund, if made in good faith and taken in connection with the literature here used, would leave no room for the conclusion that the scheme, upon the whole, was one to defraud;* * * *" (Emphasis added.)

As stated in

Evans v. United States (1894), 153 U. S. 584, 592, 38 L. Ed. 830, 833:

> "The case is not unlike that of purchasing goods or of obtaining credit. If a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment."

See also:

Brow v. United States (C. C. A. 8th, 1906), 146 Fed. 219.

The good faith of appellant in making his promise to refund on orders not filled within 45 days can best be judged by the fact that in the period from 1955 through the first 2 months of 1957 appellant did a gross dollar volume business of $74,808.20 [Tr. 402, 404, 405]. During the same period appellant refunded $1,040.58 to persons whose orders he could not fill (Appendix B). Appellant failed to refund only $775.70, which when related to a gross dollar volume of approximately $75,000.00 does not justify an inference of fraud. It is submitted by appellant that in the premises, where nearly 99 percent of his business transactions were legitimately carried on, his evasion of a duty to pay back moneys received from approximately 1 percent of his customers, while creating civil liability to those customers, is not conclusive of fraud. His business was a unified operation dealing as it did in only one type of transaction, viz., sale of pets, and his intent was always to fill the orders or return the money. It is established that where the dominant purpose of a business is lawful an allegation of fraud in the conduct of a subservient portion thereof tends to be negated. Thus in

Estep v. United States (C. C. A. 10th 1943), 140 F. 2d 40,

it is stated at page 44:

> "If the dominant purpose and object of the enterprise was to engage in legitimate mining operations, and the sale of the mining stock was purely subordinate to that end, such purposes lend themselves to legitimacy, and tend to deny criminal intent."

See also:

Gold v. United States (C. C. A. 8th, 1929), 36 F. 2d 16, 32, *supra;*

Corliss v. United States (C. C. A. 8th, 1925), 7 F. 2d 455, *supra;*

Mandelbaum v. Goodyear Tire & Rubber Co., et al. (C. C. A. 8th, 1925), 6 F. 2d 818;

Harrison v. United States (C. C. A. 6th, 1912), 200 Fed. 662, *supra.*

Additionally, it should be noted that appellant designated business adversity as the primary cause for his defalcations. In this connection the language of the Eighth Circuit in

Gold v. United States (C. C. A. 8th, 1929), 36 F. 2d 16, *supra,*

is particularly pertinent wherein it is stated at page 32:

> "Business adversity, especially in times of abnormal business conditions, does not necessarily spell fraud."

See also to the same effect:

Corliss v. United States (C. C. A. 8th, 1925), 7 F. 2d 455, *supra;*

Harrison v. United States (C. C. A. 6th, 1912), 200 Fed. 662, 671, *supra.*

In the premises appellant was not guilty of fraud.

Conclusion.

The Honorable Judge Weinberger erred in not granting appellant's motion under Rule 17(b), Title 18, U. S. C. A., *supra,* to subpoena certain witnesses at the government's expense. Appellant's affidavit in support of

said motion was sufficient and the Honorable District Judge erred in equating the word "indigent" into "pauper." Although not completely destitute, appellant was an indigent within the meaning of said rule inasmuch as he could not pay the three to four thousand dollars necessary to bring said witnesses to the trial and still support, after payment, those having a claim upon him for support. The failure of the Honorable Judge Weinberger to grant appellant's motion worked severe prejudice upon him in that he was forced to enter into a disadvantageous stipulation to secure the testimony of any of his witnesses. This in all but one case effectively deprived him of his right to cross-examination.

The case of the government relied entirely upon circumstantial evidence. There was no direct evidence introduced by the government on the salient question of appellant's state of mind. The appellant, however, directly testified that he had no intent to defraud. Where the existence of a fact is sought to be proved inferentially from circumstantial evidence, the fact does not exist if its existence is denied by direct evidence which is not incompatible with the aforesaid circumstantial evidence. Appellant did not deny the commission of the various acts testified to by the government's witnesses; he did and does deny, however, that they were done with a fraudulent intent. He explains that his defalcations resulted from poor business methods and the inherent nature of the mail order pet business rather than from any scheme or artifice to defraud. There was nothing in the government's evidence which rebutted appellant's explanation. A conviction based upon circumstantial evidence as consistent with innocence as with guilt must be reversed.

An affirmance of this conviction will place in jeopardy of criminal prosecution every mail order sales enterprise in this country.

Appellant's position is best summarized in his own words [Tr. 444-445]:

> "* * * If I may say this: If I had had a plan or an intent to defraud anybody, I can't see anybody that would work out a plan to deceive people of $4.00 and $5.00 and $5.50, even to the total amount of $600.00 or $800.00.
>
> "Also I say I have been struggling. Nobody invents a plan, I believe, and works seven days a week. On top of this I should have found out after a year this plan didn't work. If it has been a plan, it didn't work. I am just as short of funds as I have been, * * *"

Of interest in this connection are the words of Judge Yankwich in

> *United States v. Corlin* (D. C. S. D. Calif., C. Div., 1942), 44 Fed. Supp. 940, 949:
>
> "But when the Government, to prove bad faith, seeks to show what was realized from the sales, losses resulting to the selling concern are as important on the question of good faith. For a going real estate concern would not, ordinarily engage, over a period of years, in a *losing enterprise,* if its object be fraud." (Emphasis original.)

In the premises, appellant urges that this Honorable Court must reverse the judgment of conviction upon which he presently stands committed.

Respectfully submitted,

THOMAS H. LUDLOW, JR.,

Attorney for Appellant.

FOOTNOTES.

[1]Witness Youngclause did not testify to having seen an advertisement before he ordered [Tr. 9]. Witness Coon testified to having seen an advertisement for monkeys in the July, 1955, issue of "All Pets" magazine [Tr. 20]. Witness Longley testified that in the July, 1955, issue of "All Pets" magazine he saw an advertisement of appellant offering foxes for sale [Tr. 28]. Witness Hockett testified that in September, 1955, he saw appellant's advertisement in "All Pets" magazine, advertising finches for sale [Tr. 39]. Witness McCrary did not explain in her testimony how she happened to learn of appellant's operation but merely stated that, pursuant to her written request, she received a price list from appellant [Tr. 41]. Witness Pefley testified that in May, 1956, he saw appellant's advertisement in a copy of "All Pets" magazine, advertising California chipmunks and guinea pigs for sale [Tr. 47-48]. Witness Rye stated that he received a post card price list from appellant, advertising California chipmunks and golden hamsters for sale [Tr. 51]. Witness Hagerman testified that in July, 1956, he saw appellant's advertisement in "Popular Mechanics" magazine advertising baby monkeys for sale [Tr. 54]. Witness Dooley testified that in July and October of 1956 she received appellant's post card advertisements through the mails [Tr. 57-58]. Witness Beagle did not state how it came about that he happened to send an order to appellant [Tr. 63-64]. The testimony of witnesses Elsinger and Coleman was refused inasmuch as their transactions occurred outside the indictment period [Tr. 64-68]. Witness Cameron testified that he received from appellant through the mails a price list, advertising Mynah birds and parrots [Tr. 68]. By omnibus stipulation, it was stipulated that witnesses Wallingham, Beecher, Weeks, Herman, Price, Cox, Moreno, and Allen each saw an advertisement of the appellant, advertising birds and animals for sale [Tr. 76-77]. Witness Morrison testified that he received a post card advertisement through the mails from appellant [Tr. 79]. The testimony of all the foregoing witnesses was entered by stipulation. The following witnesses actually testified in court: Witness Smith testified that he received a price list through the mails from appellant [Tr. 105]. Witness Champlin testified that in March, 1955, he saw appellant's advertisement for Rhesus monkeys in "All Pets" magazine [Tr. 122-123]. Witness Frankenfield testified that in February, 1957, she saw appellant's advertisement for California chipmunks in an old issue of "All Pets" magazine [Tr. 159-160]. Witness Christiansen testified that in September of 1956 she saw a post card advertisement of appellant's for chipmunks and kangaroo rats [Tr. 181-182]. Witness Combs testified that on May 22, 1957, he received an advertisement for Mynah birds through the mails from appellant [Tr. 191-192].

[2]Witness Youngclaus [Tr. 11]; witness Coon [Tr. 23, Ex. 16]; witness Longley [Tr. 30, Ex. 21].

Witness Hockett did not testify to having received any price list stating that money would be refunded if the order was not filled within 45 days; nor did he testify that plaintiff had represented to him that Parson finches and Gouldian finches were in stock for immediate shipment [Tr. 39-40].

Witness McCrary [Tr. 41-42, Ex. 27; Tr. 47, Ex. 32]; witness Pefley [Tr. 49, Ex. 35]; witness Rye [Tr. 51, Ex. 37].

Witness Hagerman did not testify that appellant had represented that baby monkeys were in stock for immediate shipment or that money would be refunded on orders not filled within 45 days [Tr. 54-57].

Witness Dooley [Tr. 57, Ex. 42; Tr. 58, Ex. 43; Tr. 59-60, Ex. 45; Tr. 61-62, Ex. 46-A].

Witness Beagle did not testify that appellant represented that California chipmunks, golden hamsters, albino hamsters, or horned toads were in stock for immediate shipment, nor did he testify that appellant represented money would be refunded on orders not filled within 45 days [Tr. 63-64]. The proffered testimony of witnesses Elsinger and Coleman was refused by the court [Tr. 64-68]. See footnote 1, *ibid.*

Witness Cameron [Tr. 68].

Witnesses Wallingham, Beecher, Weeks, Herman, Price, Cox, Moreno and Allen, whose testimony was covered by the aforesaid omnibus stipulation (footnote 1, *ibid.*) [Tr. 76-78] did not testify that appellant had represented that the pets involved in their respective transactions were available for immediate shipment nor that he would refund money on orders not filled within 45 days.

Witness Morrison [Tr. 79-80, Ex. 59; Tr. 81, Ex. 61]; witness Smith [Tr. 105-106, Ex. 2; Tr. 118, Ex. 72]; witness Champlin [Tr. 130].

Witness Frankenfield did not testify that chipmunks were ordered pursuant to a representation by appellant that they were in stock for immediate shipment or that money would be refunded on orders not shipped within 45 days [Tr. 158-180].

Witness Christiansen [Tr. 182; Tr. 189, Ex. 72]; witness Combs [Tr. 191, Ex. 94; Tr. 201, Ex. 96; Tr. 202, Ex. 97].

[3]Witness Youngclaus [Tr. 11-12]; witness Coon [Tr. 21]; witness Langley [Tr. 30]; witness Hockett [Tr. 39]; witness McCrary [Tr. 43]; witness Pefley [Tr. 48]; witness Rye [Tr. 52]; witness Hagerman [Tr. 55]; witness Dooley [Tr. 59-60]; witness Beagle [Tr. 53]. The testimony of witnesses Elsinger and Coleman was offered and rejected (footnote 1, *op. cit.*)

Witness Cameron [Tr. 68-69]; witnesses Wallingham, Beecher, Weeks, Herman, Price, Cox, Moreno and Allen [Tr. 77]; witness

Morrison [Tr. 79]; witness Smith [Tr. 110]; witness Champlin [Tr. 126-127]; witness Frankenfield [Tr. 162, 167]: witness Christiansen [Tr. 182-183]; witness Combs [Tr. 194].

[4]Witness Youngclaus [Tr. 9, 10, 12]; witness Coon [Tr. 21-22].

Witness Hockett did not testify to having received an acknowledging letter from appellant [Tr. 39-40].

Witness McCrary [Tr. 43-44]; witness Pefley [Tr. 49].

Witness Rye did not testify to receiving an acknowledging letter from appellant [Tr. 50-53].

Witness Hagerman [Tr. 55-56]; witness Dooley [Tr. 61]; witness Beagle [Tr. 64].

Witnesses Wallingham, Beecher, Weeks, Herman, Price, Cox, Moreno and West did not testify to receiving a letter of acknowledgment from appellant [Tr. 76-78].

Witness Morrison [Tr. 79-80]; witness Smith [Tr. 112].

Witness Champlin did not testify to receiving a letter of acknowledgement from appellant; however, he did testify to having had considerable correspondence and conversation with appellant regarding the order [Tr. 121-154].

Witness Frankenfield [Tr. 165]; witness Christiansen [Tr. 184].

Witness Combs testified that he did not receive any reply to his order [Tr. 195]. However, this witness had considerable correspondance and conversation with appellant relative to the filling of his order [Tr. 190, 225].

[5]Witness Youngclaus [Tr. 18]. However, this witness has received $87.50 worth of other animals in return for his payment of $90.00 [Tr. 425-426]. Witness Coon [Tr. 27]; witness Longley [Tr. 37]; witness Hockett [Tr. 39-40]; witness McCrary [Tr. 46]; witness Pefley [Tr. 50]; witness Rye [Tr. 52]; witness Hagerman [Tr. 56-57]; witness Dooley [Tr. 61]; witness Beagle [Tr. 64].

Witness Cameron has had his full payment of $122.50 restituted [Tr. 73].

Witnesses Wallingham, Beecher, Weeks, Herman, Price, Moreno and Allen [Tr. 77]. Appellant is paying off his indebtedness to witness Weeks at the rate of $5.00 a week [Tr. 442]. Witness Morrison [Tr. 81]; witness Smith [Tr. 117]; witness Champlin [Tr. 146]; witness Frankenfield [Tr. 171]; witness Christiansen [Tr. 189]; witness Combs [Tr. 201].

APPENDIX "A"

Government Witnesses

ess	Exhibits Introduced	Indictment Witness	Stipulation Witness	Paid to Appellant	Repaid by Appellant	Witness Testified at Tr. Pages	Transaction Explained by Appellant at Tr. Pages
gclaus	1-12	Yes	Yes	$ 90.00	$ 87.50	8-19	425-426
	13-18	No	Yes	117.50	.....	20-28	438-439, 469
ey	19-24	No	Yes	12.50	.....	28-38	.....
ett	25	Yes	Yes	22.00	.....	39-41	416-424
ary	26-32	No	Yes	30.00	.....	41-47	.....
	33-36	Yes	Yes	10.00	.....	47-50	432-434
	37-38	Yes	Yes	6.00	.....	50-53	435, 453-455
rman	39-41	Yes	Yes	22.50	.....	53-57	428-430
y	42-46A	Yes	Yes	27.50	.....	57-63	427
e	47	No	Yes	11.20	.....	63-64	441, 460
er	48-55	No	Yes	.....	.....	64-67	.....
an	Rejected	No	Yes	.....	.....	67-68	.....
on	56	No	Yes	122.50	122.50	68-73	439
gham er es an o		No	Omnibus Stipulation	228.75	(per week 5.00	73, 76-78	442
son	57-61	Yes	Yes	30.00	.....	79-82	431-432
r	62-65	.....	No	(of "Popular Mechanics")		83-98	.....
nberg	67-69	.....	No	(of "All Pets")		98-104	.....
	70-72	No	No	16.25	.....	105-121	.....
olin	73-86	Yes	No	200.00	.....	121-154	406-412
enfield	87-90	Yes	No	5.50	.....	158-180	436-437
iansen	91-93	No	No	14.00	.....	180-189	.....
	94-97	No	No	55.00	.....	190-225	.....
lund	.....	.....	No	(of Better Business Bur.)		227-243	.....
an	.....	.....	No	(Postal Inspector)		243-297	.....

APPENDIX "B."

List of Refunds.

ed	Date Refunded	Amount	Refunded to	Tr.
, 1955	Nov. 27, 1955	$ 32.50	Pet House, Santa Barbara, Cal.	
	Oct. 1955	50.00	Pet Cupboard, Evergreen Park, Ill.	
	Oct. 2, 1955	25.00	Granada Pet Shop, L. A.	
	Jan. 17, 1956	40.00	Parakeet Haven, Dayton, O.	
	Dec. 9, 1955	4.00	Orinda Pet Shop	
	Mar. 26, 1956	32.50	Mr. and Mrs. Hays, Carlsbad, N. M.	
1956	Oct. 16, 1956	20.00	W. E. Bryant, Ontario, Cal.	
	Feb. 26, 1956	65.00		
	Oct. 15, 1956	95.00	Factors Pet Shop, Cheyenne, Wyo.	
		50.00	Mrs. N. Wolmuth, Denver, Colo.	
1956	Feb. 26, 1956	65.00	Pet & Pigeon Center, Sacramento, Cal.	375
	April 7, 1956	105.00	Gooney Birds Pet Shop, Honolulu, T. H.	
4, 1956	June 17, 1956	10.00	Golden Case Pet Shop, San Diego, Cal.	
1956	July 28, 1956	15.00	Fish of the Tropics, L. A.	
1956	Feb. 1957	25.00	Virginia McCleery, Palm Springs, Cal.	
1956		82.50	Bernard Fink, Monterey, Cal.	
1956	May 19, 1956	37.50	Eva Christiansen, Kennewick, Wash.	
	May 23, 1956	90.00	Lodi Pet Shop, Lodi, Cal.	
955	Aug. 13, 1956	65.00	Opal Cliffs Pet Shop, Santa Cruz, Cal.	
	Jan. 24, 1957	5.50	Larry Kaufman, Humboldt, Kan.	
	Feb. 21, 1957	3.50	Ann Oberman, Dubuque, Ia.	
		122.50	Pastime Specialties	
		$1,040.50		

Appellant testified that there could be other refunds not listed here [Tr. 382-383]. Evidently the court below also gained this impression [Tr. 383].

In addition appellant pays witness Weeks $5.00 per week [Tr. 442].